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NO.

in the Supreme Court of the United States

LAURENCE EMERY TREPANY,
GARY LYNN SALZLEIN,
MICHAEL FRANK VINO, JR.,
and JAMES F. TASSMER,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

H. DOHN WILLIAMS, JR.
VARON and STAHL, P.A.
2432 Hollywood Boulevard
Hollywood, Florida 33020
Telephone: (305) 923-1548

Attorneys for Petitioners

QUESTION PRESENTED

WHERE A SUSPECT WITH CONTRABAND IS SEEN BY THE POLICE IN THE SECLUDED, FENCED BACKYARD OF A RESIDENCE FROM A NEIGHBOR'S YARD, THE POLICE MAY NOT ENTER THE BACKYARD, ARREST THE SUSPECT, AND SEIZE THE CONTRABAND WITHOUT A WARRANT, ABSENT EXIGENT CIRCUMSTANCES. TO HOLD OTHERWISE WOULD BE CONTRARY TO THE TEACHINGS OF *COOLIDGE v. NEW HAMPSHIRE*, 402 U.S. 443 (1971) AND *PAYTON v. NEW YORK*, 445 U.S. 573 (1980).

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii, iv
Judgment and Opinion of the Court Below	2
Statement of Jurisdiction	2
Constitutional Amendments Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	9

TABLE OF AUTHORITIES

Page

Agnello v. United States,
269 U.S. 20 (1925) 7

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 6

Fixel v. Wainwright,
492 F.2d 489 (5th Cir. 1974) 7

Huffer v. State,
344 So.2d 1332 (Fla. 2 DCA 1977) 7

Marcello v. United States,
328 F.2d 351 (5th Cir. 1964) 7

Payton v. New York,
445 U.S. 573 (1980) 8

State v. Morsman,
394 So.2d 408 (Fla. 1981) 7

State v. Parker,
399 So.2d 24 (Fla. 3 DCA 1981) 7

Taylor v. United States,
286 U.S. 1 (1932) 7

TABLE OF AUTHORITIES (Continued)

Page

United States ex. rel. Boyance v. Myers,
398 F.2d 896 (3rd Cir. 1968) 7

United States v. Mullin,
329 F.2d 295 (4th Cir. 1964) 7

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PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

To: The Honorable Chief Justice and Associates Justices of the Supreme Court of the United States.

Petitioners, Laurence Emery Trepany, Gary Lynn Salzlein, Michael Frank Vino, Jr., and James F. Tassmer, pray a Writ of Certiorari issue to review a final judgment

of the Fourth District Court of Appeal of Florida reversing the trial court's order (i.e., Circuit Court of the Seventeenth Judicial Circuit of Florida) which granted the Petitioners' motion to suppress physical evidence.

JUDGMENT AND OPINION OF THE COURT BELOW

In a written opinion, the Fourth District Court of Appeal of Florida reversed the trial court's (i.e., Circuit Court of the Seventeenth Judicial Circuit of Florida) order granting the Petitioners' motion to suppress. The Petitioners then filed a timely Petition for Writ of Certiorari to the Supreme Court of Florida. The Supreme Court of Florida declined to accept jurisdiction. Accordingly, the order and opinion of the Fourth District Court of Appeal of Florida stands final.

JURISDICTION OF THIS COURT

This Petition is filed within sixty (60) days of the Supreme Court of Florida's denial of the Petitioner's Writ of Certiorari. The Supreme Court of Florida's order was rendered September 2, 1982.

The jurisdiction of this Court is invoked, made and conferred under Title 28 U.S.C. §1257(3) and this Court's Rules 17 through 23.

CONSTITUTIONAL AMENDMENTS INVOLVED

Fourth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

STATEMENT OF THE CASE

The Petitioners were charged by Information with the offense of "Trafficking in Cannabis" contrary to Florida Statute 893.135. The Petitioners moved to suppress the contraband which formed the basis of their charge on the grounds of an unlawful search and seizure. The trial court in granting the Petitioners' motion to suppress held there was no justification or support for the trespass by the police officers in the arrest and detention of the Petitioners prior to the obtaining of a warrant. Nor, was there any basis for any conclusion that the Petitioners were going to remove the contraband from the residence prior to obtaining a warrant, or that the Petitioners themselves would escape, or that any such escape, should it occur, could be successful. The trial court went on to state that the Petitioners were under surveillance at all times, there was no reason to believe they were aware of their imminent arrest, and any attempt to escape could have been easily frustrated. The trial court held the police's conduct did not come within the purview of any of the exceptions to the warrant requirement, nor were there any exigent circumstances. The trial court found that the State presented no acceptable argument as to why the officers should have been permitted to go onto the property without a warrant.

The State of Florida appealed the trial court's ruling to the Fourth District Court of Appeal of Florida. The District Court in a written opinion reversed the trial court's order of suppression.

The Petitioners filed a timely Petition for Writ of Certiorari to the Supreme Court of Florida; however, the Court denied the Petition on September 2, 1982.

REASONS FOR GRANTING THE WRIT

The police received an anonymous tip that a sailboat "riding low in the water" was docked behind a house. From a vantage point across the canal, they began surveilling the sailboat. The sailboat was docked at the rear of a single family dwelling.

After seven hours of surveillance, during the dark, early morning hours the police by means of a night vision scope, which enhances one's ability to see in the dark, and binoculars, observed bales being removed from the sailboat. The bales were carried through a small opening in the fence-hedge into the back yard on into the back door of the house. The police never observed any bundles being carried out the side gate of the back yard which led to the front of the house where motor vehicles were parked. The police never observed any bundles being placed into any motor vehicles.

After observing a few of these trips, the officer who was surveilling the residence from across the canal radioed his fellow officers who had rendezvoused at a staging point a block away to move onto the property. The police had a *prearranged* investigative plan. If bales of suspect marijuana were unloaded from the sailboat, they would immediately converge on the house. The persons at the house would be arrested. The house and sailboat would be seized and secured. Then, a warrant would be obtained. Consistent with their plan, the police with guns drawn rushed into the secluded, fenced back yard of the residence and arrested the Petitioners. The Petitioners were handcuffed and held at gunpoint for five hours until the police executed a warrant.

The physical setting of the property, house, and back yard is important. The house is located on the southwest side of a peninsula. There is one roadway off the peninsula which intersects with an east-west roadway. Motor vehicular traffic leaving the peninsula can be easily observed from vantage points along the east-west intersecting roadway. The waterway behind the residence is a dead end canal, with only one exit. Departure from the canal can be easily observed.

The house is a single family dwelling, located in a neighborhood of single family dwellings. The house sits on a lot whose dimensions are approximately sixty-five (65) feet wide by one hundred thirty-five (135) feet deep. The width of the property runs north and south and the length runs east and west. There is a fence and dense hedges along the north boundary line of the property. Likewise, there is a fence and dense hedges along the south boundary line of the property. The house itself consumes almost the entire width of the property with only the minimum easement on each side. Thus, one cannot observe the back yard from the front street. Along each side of the back yard there was a fence and dense hedges which prevented observation into the back yard by next-door neighbors. Along the sea wall, there is a dense hedge seven (7) feet in height with a small break in the hedgerow to allow access to the dock. In summary, the back yard was barricaded on three sides by a fence and tall, dense foliage. On the other side the house, itself, prevented observation from the street. Plus, that evening there was the forty-five (45) foot sailboat, which was docked parallel to the sea wall, and which almost stretched from lot line to lot line across the sixty-five (65) foot width of the property. This sailboat with its superstructure

formed an additional barrier along the sea wall side of the back yard which already had the seven foot high hedgerow to block the view.

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), this Court set forth the "plain view" doctrine as an exception to the warrant requirement. This Court held that in a situation where an officer is legally inside a constitutionally protected area and inadvertently observes contraband also in the protected area that the officer could seize the contraband without first obtaining a warrant. This Court emphasized that it is critical under the "plain view" doctrine for the officer to be already inside the constitutionally protected area when he inadvertently discovers the contraband.

The "plain view" doctrine has been misunderstood and misapplied to include other distinct factual situations. The doctrine has been confused with, or applied in, situations where both the officer and the contraband are in a non-constitutionally protected area such as an open field or in a public place. Because no protected area is involved, the resulting seizure has no Fourth Amendment ramifications. Nonetheless, courts have characterized this as a "plain view" search.

The "plain view" doctrine has also been applied to the *pre-intrusion* situation. In such a case, the officer is located outside a constitutionally protected area and is looking into such an area. If the officer observes contraband in this situation, it only furnishes him probable cause to seize the item. He must either obtain a warrant, or have some exception to the warrant requirement before he may enter the protected area and seize the contraband. The officer's mere acquisition of probable

cause by means of an "open view" does not justify his warrantless intrusion into the constitutionally protected area. ". . . (P)lain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle . . . that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances'." *Coolidge, supra.*

Assuming arguendo in the case sub judice that the officer's observations were lawful and provided probable cause, "It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot itself justify a search without a warrant." *Agnello v. United States*, 269 U.S. 20 (1925); *Taylor v. United States*, 286 U.S. 1 (1932).

The secluded, fenced back yard enclosed by high hedges was a constitutionally protected area. The courts have historically extended the Fourth Amendment's protection to the area immediately surrounding and closely related to the dwelling. The curtilage has come to mean the yard, courtyard or other piece of ground included within the fence surrounding a dwelling house. *Fixel v. Wainwright*, 492 F.2d 489 (5th Cir. 1974); *Marcello v. United States*, 328 F.2d 351 (5th Cir. 1964); *United States v. Molkenbur*, 430 F.2d 563 (8th Cir. 1970); *United States ex. rel. Boyance v. Myers*, 398 F.2d 896 (3rd Cir. 1968); *United States v. Mullin*, 329 F.2d 295 (4th Cir. 1964). The Florida Supreme Court and Florida Appellate Courts have held the "back yard" of a residence is a constitutionally protected area. *State v. Morsman*, 394 So.2d 408 (Fla. 1981); *Huffer v. State*, 344 So.2d 1332 (Fla. 2 DCA 1977); *State v. Parker*, 399 So.2d 24 (Fla. 3 DCA 1981).

The question is then, did the police have some justification for entering this constitutionally protected area? The other exceptions to the warrant are: (1) consent, (2) search incident to a *lawful* arrest, (3) probable cause plus exigent circumstances, (4) hot pursuit, (5) stop and frisk, and (6) inventory searches of automobiles. Clearly, consent, hot pursuit, stop and frisk, and the inventory search of an automobile would be inapplicable.

The "search incident to a *lawful* arrest" exception would be inapplicable because in *Payton v. New York*, 445 U.S. 573 (1980), this Court held one cannot be *lawfully* arrested within the sanctity of one's home, nor may the police cross the threshold of one's home without a warrant, absent exigent circumstances. The trial court found there were no exigent circumstances because there was no basis to conclude that the Petitioners were going to remove the contraband from the residence. Nor was there reason to believe the Petitioners themselves would escape, or that if any such escape should occur that it could be successful. The trial court found the Petitioners were under surveillance at all times; there was no reason to believe that they were aware of the surveillance or of their imminent arrest; and any attempt to escape could have been easily frustrated. Because of the large amount of contraband, there was no reason to believe that the contraband would be destroyed.

Lastly, "probable cause plus exigent circumstances" would be inapplicable because the trial court found no exigent circumstances. Further, because the case involved a home, the law of *Payton v. New York*, *supra*, would control.

CONCLUSION

In conclusion, the police in Florida have developed an investigative technique whereby vessels docked behind private homes are periodically surveilled. If suspect contraband is observed being off-loaded and taken into the residence, without any effort being made to first obtain a warrant, the police immediately converge on the residence. The persons at the residence are arrested, the house seized and secured, and then the police obtain a warrant. Such an investigative technique is an affront to the basic principle of Fourth Amendment law that warrantless searches or seizures of homes are presumptively unreasonable.

Respectfully submitted,

H. DOHN WILLIAMS, JR.
VARON and STAHL, P.A.
2432 Hollywood Boulevard
Hollywood, Florida 33020
Telephone: (305) 923-1548

Attorneys for Petitioners

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JANUARY TERM 1982

STATE OF FLORIDA,

Appellant,

v.

LAWRENCE TREPANY, JAMES TESSMER, GARY SALZLEIN and FRANK VINO, JR.,

Appellees.

CASE NO. 81-1407

Opinion filed February 10, 1982

BERANEK, J.

The State appeals the granting of a motion to suppress in this drug case. As the result of an anonymous phone call, the Broward County Sheriff's Office began surveillance of the residence and boat which were involved in the suppression hearing. An officer viewed the area from across a canal with the aid of a night scope and noticed that the boat was riding low in the water. After some hours, a person came onto the deck of the boat, scanned the canal area with the use of a night scope similar to that being used by the officer and left. Later, two people went below deck and started transporting bundles from the boat to the back of the house. All of this activity was carried out in darkness. Lights were

not turned on in the boat or in the house. Recognizing the bales as marijuana, the officer radioed support units. These officers approached the house and detained one man who was carrying a large package into the house. Next, an officer went to the boat, identified himself, and asked anyone on board to get off. Receiving no response, the officer stepped onto the top section of the boat and shined a flashlight. Two men exited and were detained. Finally, an officer called into the house and a fourth man exited the home. The police arrested all four and then proceeded to obtain a search warrant prior to entering the house and the boat.

The trial court held that the surveilling officer lawfully observed the above occurrences and had grounds for seeking a warrant. Furthermore, the court found the warrant was legally sufficient and based upon probable cause. However, the court granted the motion to suppress because there was "no justification or support for the trespass by the police officers and the arrest and detention of the defendants prior to the obtaining of a warrant." We reverse. In its suppression order, the trial court relied on our opinion issued on March 12, 1980 in the case of *Rizzo v. State Ex Rel City of Pompano Beach*, whose facts were similar to this case. We granted rehearing in *Rizzo* and reversed our prior decision. The final holding in *Rizzo* was that the arrests and seizures made under similar circumstances were lawful. *Rizzo v. State Ex Rel City of Pompano Beach*, 396 So.2d 869 (Fla. 4th DCA 1981). Unfortunately. the trial court did not have the benefit of our opinion on rehearing. Pursuant to that opinion, we conclude the motion to

suppress in this case should have been denied. The order granting suppression is vacated and the case remanded for further proceedings.

REVERSED AND REMANDED.

HERSEY, and DELL, JJ., concur.

SUPREME COURT OF FLORIDA

THURSDAY, SEPTEMBER 2, 1982

LAWRENCE EMERY TREPANY,
JAMES F. TESSMER, FRANK MICHAEL VINO, JR.,
and GARY SALZLEIN,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 61,913

District Court of Appeal,
4th District — No. 81-1407

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ALDERMAN, C. J., OVERTON, McDONALD and EHRLICH, JJ., Concur

ADKINS, BOYD and SUNDBERG, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: Debbie Causseaux
Deputy Clerk